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IN THE

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1944**

## No. 721

JEWELL RIDGE COAL CORPORATION, A CORPORATION,

*Petitioner,*

*vs.*

LOCAL NO. 6167, UNITED MINE WORKERS OF AMERICA, AN UNINCORPORATED ASSOCIATION, AFFILIATED WITH THE INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, et al.,

*Respondents.*

## BRIEF OF COUNSEL FOR RESPONDENTS

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PRESS OF JUDD & DETWEILER, INC., WASHINGTON, D. C.

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## BRIEF OF RESPONDENTS

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### I. Statement of the Case

Jewell Ridge Coal Corporation brought suit for declaratory judgment against two local unions, District No. 28, and the International Union of United Mine Workers of America and an officer or officers and a member or members of each. (R. 2).

The defendants filed an answer and counter claim for the underground employees. (R. 18).

On stipulation of the parties, a pretrial order was entered by the Court, Sections 12 and 13 of which read as follows:

"(12) It is further stipulated and agreed by all parties, by counsel, that the issues to be tried in this action are as follows:

a. What constitutes the working time which makes up the work week of plaintiff's underground employees within the meaning of Section 7 of the Fair Labor Standards Act of 1938, and what amounts, if any, are due and unpaid to such employees under said Section, the determination of such amounts, if any, to be later referred to a special master:

(1) In reference to "a" above, the plaintiff contends that such work week does not include that portion of the time spent by its underground employees in being transported or walking to and from their usual working places.

(2) In reference to "a" above, the defendants contend that such work week includes all the time from the time such employees are required to report and do report for work at the portal of the mine until they return to the portal at the end of the shift, less the regular lunch period when they are relieve of all duties.

"(13) It is further stipulated and agreed that:

a. Plaintiff is a corporation organized under the laws of the State of Virginia and was incorporated prior to October 24, 1938, and

b. That this is a class action binding upon and inuring to the benefit of all plaintiff's underground employees." (R. 32).

The District Court rendered judgment on January 25, 1944, in which the Judge ordered and declared as follows:

"(1) That the Fair Labor Standards Act of 1938 does not require that there be included within the work week of underground workers in plaintiff's mines, either time spent by such employees outside the portal of the mines before entering therein, or time spent in traveling from the portals to their usual places of work and return; and

"(2) That plaintiff, in computing the work week of its underground employees on the basim of hours of work in the mines at their usual working places, exclusive of the lunch period, and the time spent outside the portals, and travel time from the portals to their usual working places and return, as provided in the effective wage agreements and continuations thereof, and in paying its underground workers for their services on that basis, has complied with and discharged all its obligations imposed upon it by the (fol. 773) Fair Fair Labor Standards Act of 1938.

"And all the objects of this action having been accomplished, defendants being entitled to recover nothing on their counter-claim, it is ordered that the same be, and it hereby is, dismissed at the costs of the defendants; to all of which action of the Court in declaring the rights of the parties contrary to their contentions, and in dismissing this action at their costs, the defendants, by counsel, duly objected and excepted upon reasons fully stated to the Court." (R. pages 578 and 579)

The findings of fact and conclusions of law of the District Court are set up beginning with page 542 to 571, both inclusive, of the Record. It is reported in 53 Fed. Supp. 935.

The Circuit Court of Appeals for the 4th Circuit reversed the judgment of the District Court, Judge Soper dissenting. 145 Fed. (2) 10.

This Court granted certiorari on petition of Jewell Ridge Coal Corporation.

## II. Jurisdiction

This Court has jurisdiction based on Section 240(a) of the Judicial Code, 28 U. S. C. A. 347, as amended by the Act of February 13, 1925. We do not concede the grounds upon which jurisdiction has been invoked by the petitioner in this particular case.

## III. Statement of the Matter Involved

The fundamental question in this case is whether or not travel time in coal mines is work time under the provisions of Section 7 of the Fair Labor Standards Act of 1938. Counsel for petitioner also raise the question of whether underground workers in coal mines are to be denied the benefits of Section 7 of the Fair Labor Standards Act because of (a) Long continued custom not to pay for travel time; (b) The claimed existence of contracts upon a face-to-face basis; (c) A claimed intention of Congress to except the coal industry from the provisions of the Act.

## IV. Summary Statement of the Facts

The statement of facts made by petitioner does not convey to the reader a precise and complete picture of the two mining operations of the Jewell Ridge Coal Corporation. After reading it one would have the impression that the underground employees could wander into the mine afoot or ride mantrips according to their whim of the moment. Such is not the case at all.

At the mine named Jewell Valley, all underground employees must report at the mine mouth and ride mantrips or machines which they operate themselves, into the mine. At the mine named Jewell Ridge, there are physical peculiarities which make it necessary for 72 employees to enter

the mine at openings other than the mine mouth. These 72 employees live on hills or mountains remote from the mine portal. The roads from their homes to the mine portal are not improved. They become impassable. But the mine track follows the level coal seam out of one hill or mountain and into another at a number of different places. These openings are convenient entrances and exists for the 72 who otherwise could not get into the mine. (R. 213.)

All the other underground employees at this mine report at the main portal. (R. 213.) They ride mantrips, unless they are machine or motor operators who have to take in their machines. (R. 277, 279, 281.)

Those employees who live in company houses walk or ride to the mine mouth as they please. Those who live at a great distance are hauled free to the mine mouth in busses furnished by the company, or make their own transportation arrangements. (R. 244.)

Each underground employee carries with him into the mine his dinner and his supply of drinking water for the day. (R. 372.) The mines have no water system. Each underground employee is required to carry an individual lamp to light his way or place in the mine. (R. 221.) The lamps are electric battery lamps and the batteries weigh about five pounds. (R. 219.) The light is fastened to the miner's cap and the battery to his belt. (R. 223.)

The first thing all underground employees do upon arrival at the mine mouth is to get their lamps and batteries from the lamp house nearby. (R. 367.) They then engage in various activities dependent upon their classification, before entering the mine.

### (*a*) *Machinemen*

Those machinemen who have motors, first get their motors out of the yard and switch them to the sand house where they fill four sand boxes holding approximately two

bushels of sand, and oil the motors. They get two gallons of oil from the oil house, approximately 50 pounds of machine bits from the blacksmith shop, and such other equipment as may be necessary, including at times, rope, fingers for the starting box, and jack pipes. Those who have motors, load these supplies and equipment on to their motors. Those machinemen who do not take motors into the mine ride mantrips and load their supplies and equipment on to the tool car of the mantrip on which they ride. (R. 401-402.)

(*b*) *Motormen and Brakemen*

Motormen and brakemen go through the same process of getting oil and sand for their motors as that followed by the machinemen. Motors are brought out of the mine at the end of each shift for the purpose of being sanded, oiled and occasionally repaired. (R. 477-478.)

(*c*) *Trackmen*

Trackmen get from the blacksmith shop such tools as they may have brought out for repair. If bolts and spikes are needed, they get them in kegs weighing approximately 200 pounds and load them into the tool car on the mantrip on which they ride. (R. 441-2.) Some of the trackmen take in steel cross-ties and, once or twice a month, a number of angle bars. (R. 442.)

(*d*) *Bratticemen*

Bratticemen carry from the supply house to the tool car on the mantrip eight or nine pounds of nails, and as needed, cement, bolts, wrenches, plaster, and rolls of brattice cloth. (R. 432.) The latter weigh between 60 and 100 pounds. (R. 434.)

### (e) *Wiremen*

Wiremen load on to the tool car each day their usual small tools, Stillson wrenches, hammers, chain blocks, "comealongs," wire splicers, drills, hack saws, hatchets, braces and bits, clip wrenches, and bell wrenches. (R. 451.) Copper wire in lengths of 100 feet or more, blow torches and solder are taken in as needed. (R. 453.)

### (f) *Coal Loaders*

The coal loaders, constituting the most numerous class of underground employees, take from the blacksmith's shop to the tool car, some four or five times a month such of their working tools as they may have brought out of the mine for repairs. Their tools consist of picks, shovels, augers, breast plates, tamping bars, wedges, axes and saws. (R. 367, 385, 396, 459.)

### (g) *Services Continue in Transit*

Each employee follows through to its destination, whatever he may have loaded into a tool car or on to a motor. (R. 235.) When the tool car reaches its terminus the employee sees that his tools, equipment and supplies are unloaded and, in most instances, carries them himself to the place at which they are to be used. (R. 371.)

## The Underground Journey

The distances from the main portal or drift mouth to the rooms in which the coal is mined are so great that the use of mantrips to haul the men to mantrip stations is necessary to the successful operation of the mines. At Jewell Ridge, the distances from the portal to the various mantrip stations range from 4,250 feet to 25,460 feet. (R. 115-632.) At Jewell Valley the distances vary from 2,600 to 14,450

feet. (R. 211-704.) The mantrips are made up of coal cars used for hauling coal out of the mines, and are pulled by electric motors. (R. 229.)

The mantrips are organized, operated and supervised by the company. (R. 225-226.) They run on schedules fixed by the company. (R. 225.) They move out on the order of company dispatchers. (R. 225.) A foreman rides each mantrip. The men are under the control of this company foreman. (R. 226.) He sometimes gives work instructions during the ride. (R. 379, 381-2, 396, 468, 474.) He sees to it that the men sit on the side of the car away from the trolley wire. (R. 370, 382.) No more than seven men are allowed to ride on a car. (R. 370.) A separate tool car is provided on each mantrip. (R. 226.) No man is allowed to carry any tool into the car with him. (R. 226.) The rules of the company adopted in conformity with the mining laws of the State of Virginia contain eleven separate safety rules relating to mantrips, five of which deal with the conduct of the men while on the mantrips. (R. 493-494.) Failure to observe a rule carries a warning for the first offense, two days' layoff for the second offense and five days' layoff or discharge for the third offense. (R. 494.)

If a man misses a mantrip, the company always provides some means for him to get to work. (R. 227.) Furthermore, no walkways are provided along the main haulageways. (R. 69, 393-4.) The track in those haulageways is cluttered with coal. (R. 437, 446.)

## Underground Hazards

The coal seams in the two mines vary in thickness from 32 to 54 inches. (R. 84.) In some places the cross-collars supporting the roof are so low they scrape the coal off the cars as they are being hauled out. (R. 485.) In places the men could ride or walk erect but, for the greater part of the

ride, they sit bent over or stooped, and after leaving the main haulageways they must, in places, bend far over or else get down on the mourner's bench of the coal car in order to avoid injuries from contact with the roof. (R. 474.) They run the risk of falling rock or slate, of broken trolley wires, and of wrecks occurring on the mantrip. (R. 470, 377, 397, 378, 334, 446.)

Coal mining is a hazardous occupation. (R. 164.) There is a greater hazard in working underground than outside. (R. 165.) The overall picture of the dangers and the necessity for unceasing vigilance is graphically portrayed in the language of the State Mine Inspector of Virginia (R. 499-503) and of the witness Tetlow (R. 325-326; 359-361). Statistics for the year 1941 show that approximately one man out of every ten engaged in coal mining in the United States was injured during that year (R. 333).

The District Judge found that, in view of those statistics, injuries in plaintiff's mines on mantrips were surprisingly few in number and extent. The evidence disclosed that two men had been killed (R. 384), another had received injuries to his back (R. 378), while another had his ribs broken (R. 378); one man had been burned by a broken trolley wire while riding a gathering motor (R. 392), and four other men had received injuries. (R. 397, 461.) The Company kept no record of injuries unless the accident was compensable, i. e., the workman lost seven days from his work. (R. 529, 527.)

After leaving the mantrip at the mantrip stations, the coal loaders in Jewell Ridge pick up the powder they will need for the day, get such tools as they brought in from the outside, and carry the tools, powder, lamp, and their drinking water for the day, as they walk to their usual working places. (R. 371-372.)

The distances walked vary from about 500 feet to about 1,500 feet. The roof is lower than it is in the haulageways,

and the workmen must walk in many places in a stooped position or all bent over (R. 372). In places, the back of a man scrapes the roof as he walks and thereby wears out the top of his jacket (R. 462). When a man learns to walk in that low coal, he walks with his hands as much as his feet. (R. 270.)

While walking in the mines, the men must be on the alert to avoid injuries from tram trips catching them in narrow places. (R. 388, 447.) They must also avoid contact with the exposed trolley wire. Because of this danger, a rule of the company forbids the men to carry tools on their shoulders. (R. 852.)

The exit from the mines at the end of the shift is substantially a reverse process of the entrance into the mines (R. 375). They bring to the powder station unused powder (R. 271), and such tools as need repair (R. 376, 271).

The mantrips at Jewell Ridge start running at seven a. m. (R. 227) and follow one another not closer than 500 feet (R. 225). Pay time starts at eight o'clock (R. 227). At Jewell Valley the mantrip starts at seven thirty a. m. and pay time starts there at eight o'clock (R. 464).

We have not been able to find any dispute in the evidence as to a single essential feature of the mining operations.

### Decision of the District Judge

The District Judge did not make any finding of facts contrary to the facts above enumerated. His findings include general statements, such as the following "Employees leave the trains at the 'mantrip stations' which are nearest to their respective places of work, and walk the rest of the way" (R. 545).

"After securing their lamps, various men do various things before taking the mantrip (R. 546). These preliminary activities require variously from three to ten minutes" (A. 546).

## V. Summary of the Argument

1. The law is clear. Section 7 of the Fair Labor Standards Act of 1938 provides that no employer shall employ any of his employees, who is engaged in commerce or in the production of goods for commerce, for a work week longer than the stated number of hours, unless such employee receives compensation for his employment in excess of the stated hours at a rate not less than one and one-half times the regular rate at which he is employed. Employ is defined, "Includes to suffer or permit to work."

If the employee works more than the stated hours he must be paid for the excess time at rate and one half. No opening is left whereby the employer may avoid the required payment.

2. The law which petitioner seeks to have construed is not a law appearing in any Act of Congress. The argument of counsel for petitioner is in effect an invitation to judicial legislation.

3. The underground employees of the petitioners were at work from the time they were required to report and did report for work at the portal of the mine until they returned to the portal of the mine at the end of the shift, less the regular lunch period when they were relieved of all duties. This working time comprised the work-week. At the time the employees reported at the portal they had surrendered their will to the will of the master. They were then and there subject to his direction, supervision and control. They were expending energy in his behalf to accomplish his purposes in mining coal. They were not engaged in recreation or pleasure. The things that they were doing were absolutely necessary to the production of coal. Those things required effort and alertness. They subjected the workmen to fatigue and serious dangers.

4. The decision of this Court in *Tennessee Coal, Iron & Railroad Co.* v. *Muscoda Local No. 123, et al.*, 321 U. S. 590 is controlling and was correctly followed by the Circuit Court of Appeals for the 4th Circuit in its opinion.

5. Neither custom nor contract can avail to nullify the express provisions of the Fair Labor Standards Act of 1938.

## Argument

In the first opinion of the Circuit Court of Appeals for the 5th Circuit in the case of *Tennessee Coal, Iron & Railroad Co.* v. *Muscoda Local No. 123, et al.*, 135 Fed. 2nd 320, Circuit Judge Holmes used this language:

> "Whatever may be said as to inferences from the facts, the law of this case is not doubtful" (Page 322).

We are unable to see any language in the Act itself creating any doubt as to the intention of Congress. The law is stated in language that is simple and easy to understand so far as the present status of this case is concerned. We are not, as yet, confronted with any problems arising from the phrase "rate of employment". The possibility of figuring out different formulae to apply in order to get the regular rate of employment does not obtain with reference to the statutory duty to pay one and one-half times that regular rate, whatever it may be, for all hours in excess of those prescribed by the Act. The law which petitioner seeks to have construed by this Court would, in our judgment, read as follows:

"Unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed"; provided, however, that this law shall not apply wherever there has been a custom to pay

men for a part only of their work, and; provided further, that this law shall not apply wherever the employees have had a contract by which they were paid for less than all their hours of work; and provided further, that the employees have never unsuccessfully asked to be paid for all their hours of work; and provided further, that the act shall under no circumstances apply to those engaged in the business of mining coal, anywhere in the United States.

Congress did not add the provisos above set forth to the law which it enacted. The language of the Congressional Act applies with a direct and powerful brevity to every type of business in the United States in which employer and employee were engaged in interstate commerce or the production of goods for interstate commerce except those specifically exempted.

As we read the brief of petitioner's counsel, they attribute importance to the following unimportant circumstances:

(a) Mr. Lewis did not expect the bill to affect the coal industry.

(b) Mr. Lewis did not believe that the Act would outlaw the face-to-face definition and make mandatory the portal-to-portal basis.

(c) Mr. Lewis did not desire the Act to affect the coal industry.

(d) The position of Mr. Lewis in the wage negotiations was not consistent with his demand for the benefits of the law.

(e) The mine workers refrained throughout the 1943 wage conference from asking all the benefits to which they were entitled under the Fair Labor Standards Act.

Is it not clear at a glance that there is no substance to any of these contentions. The hope or expectancy or desire or

demands or failure to make demands of those affected by an Act of Congress are of no legal consequence. Inclusion within a law of the United States is not a matter of voluntary assent or of psychological attitudes.

The claim made by the respondents in this case was for the 8 pay periods from April 1 to June 20, 1943. They made that claim within five months. The penalty for refraining too long is the statute of limitations or the doctrine of laches. The applicable Virginia statute of limitations is three years; it is not five months.

## VI. Consistency

The argument on consistency, sub-division 10 on page 37 of the brief of the petitioner, lacks one important element. Apparently petitioner is trying to set up some sort of estoppel. He gives but one-half of an estoppel in charging inconsistency. The other equally vital half is action in reliance thereon by petitioner. Nowhere does petitioner claim that the inconsistent position caused any loss or damage to petitioner.

## VII. Dangers to Underground Workmen

We have set up in appendices 2, 3 and 4 Governmental reports which show beyond the peradventure of a doubt whether coal mining is dangerous. Mr. Charles O'Neill testified that it was a hazardous occupation (R. 164). If coal mining was not dangerous and if travel along the haulage ways was not dangerous, why did the law of the State of Virginia or Jewell Ridge Coal Corporation require so many safety measures? If travel was not dangerous, why such remarkably slow speed for mantrips as 6 miles per hour in this age of rapid locomotion? State law prescribed that every mantrip should have a tool car. If riding on the mantrips involved no more danger than riding in an auto-

mobile, why couldn't a miner have his pick or his shovel in the car with him?

Respondent's Exhibit No. 1, page 841 of the Record, introduced at R. 493, has special rules for the safety and operation of mines. Eight of those rules deal with mantrips (Rules 29 through 36, pages 849 and 850 of the Record).

The facts heretofore detailed show that the Jewell Ridge Coal Corporation supervised the mantrips (R. 225, 226, 228). Counsel for the petitioner argue that such supervision was for safety and was required by law. Could there be a clearer illustration of the fact that travel on the mantrips is dangerous than the existence of laws requiring special precautions to be taken with reference to mantrips? Furthermore, we respectfully submit that the motive which prompts an employer to supervise the travel of his employees is of no importance. It is the fact of supervision which puts the employee under the direction and control of the employer. It is the fact of supervision which gives an important factor in solving the problem of whether the employee is at work. Whether the employer exercised supervision to escape damage suits or to avoid the payment of high insurance premiums to an insurance carrier, or whether he exercised supervision because the law required him to exercise it, appear to us to be of no moment whatsoever.

## VIII. Custom and Collective Bargaining Contracts

The position taken by counsel for petitioner with reference to custom and collective bargaining bear a striking similarity to the position taken by counsel for the Tennessee Coal, Iron & Railroad Company in this Court in that case. The brief of Gov. Miller and Mr. Burr was not limited to the operation of ore mines. Gov. Miller and Mr. Burr argued before this Court the coal situation. They attached the

Houck letter as an appendix to their brief and also the opinions of Chairman Davis and member Morse of the National War Labor Board. We can assume, therefore, that this Court had in mind the coal situation when it rendered the opinion in the ore case. With that in mind, Mr. Justice Murphy used this language:

> "But in any event it is immaterial that there may have been a prior custom or contract not to consider certain work within the compass of the workweek or not to compensate employees for certain portions of their work. The Fair Labor Standards Act was not designed to codify or perpetuate those customs and contracts which allow an employer to claim all of an employee's time while compensating him for only a part of it. Congress intended, instead, to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act. Any custom or contract falling short of that basic policy, like an agreement to pay less than the minimum wage requirements, cannot be utilized to deprive employees of their statutory rights." (p. 602)

It is interesting to observe that counsel for petitioner praise Mr. Charles O'Neill and attach importance to his testimony that chaos would result if the portal-to-portal method of computing miners wages should be adopted. We thought it sufficient impeachment of Mr. O'Neill to show that he himself had offered contracts to the United Mine Workers which contained provisions for the payment of travel time. It seemed very queer that he should tell the Court that chaos would result when he himself was the sponsor on more than one occasion of the very thing which he condemned. In fact, the day before Mr. O'Neill took the stand as a witness in this case, his committee offered still another portal-to-portal contract to the U. M. W. A.

Mr. O'Neill's proposed contract dated June 14, 1943 was introduced at page 339 of the Record and appears at page

813. The fourth draft dated September 12, 1943 was introduced by the respondents at page 341 of the Record and appears at page 816. The third tender of a contract by Mr. O'Neill, the day before he appeared as a witness, appears as defendant's Exhibit F on page 826 of the Record, and was introduced at page 345. We respectfully submit that the contracts so tendered to the United Mine Workers of America by the witness O'Neill clearly reveal that what he was trying to do was very different from what he was testifying.

We concede, of course, that Mr. O'Neill is an important operator and, in fact, think that his testimony and the testimony of witness Tetlow give a graphic history of coal mining in the United States which is well worth reading in detail.

## IX. Underground Travel in Respective Mines

On page 61 of their brief, counsel for petitioner set up four elements upon which they attempt to base a distinction between the underground travel in the two mines. The first element is supervision by the employer. Counsel attempts to escape the effects of supervision upon the theory that it was a safety measure. In fact, the Record shows that the mantrips were desired by the company (R. 69). They increased orderliness (R. 70). It is customary in the districts in which the mines are located to have mantrips (R. 71). The mantrips are scheduled by the company (R. 39 and 225). The mantrips are supervised as to speed (R. 164, 228). The mantrips are in charge of the section foreman who see to it that the men sit in the mancars on the opposite side from the trolley wire (R. 226). The foreman's connection with the mantrips is also mentioned on pages 369, 370, 381, 391 and 393 of the Record. In addition to supervision the foreman, while on the mantrips, some-

times gives instructions to the men (R. 396, 379, 381, 382, 468, 474). Mantrips are an advantage to both the company and the men (R. 40). If a man misses a mantrip, the company finds a way to get him in the mine (R. 227). Mantrips are necessary in order that the men may be in shape for work when they arrive at their working places (R. 258). It is not practical to operate the mines without mantrips (R. 259).

The second element upon which a distinction is sought to be based by counsel is "physical and mental exertion". This distinction fails because of the actual travel in the haulage ways. There are low places in which men riding in the mantrips have to be on guard in order to avoid getting their heads busted (R. 420). There is the hazard of wrecks (R. 388, 389, 377, 461, 470), of slate falls (R. 463). The manner in which the men sit in the mantrips is described at page 474 of the Record. This shows that men sit on the mourner's bench and have to duck over, and that this is true even in the main entrance. If the men rode on up to the working place they would have to get up off the mourner's bench or lie down in the car (R. 475).

The third element on which a distinction between travel in coal mines and travel in ore mines is attempted by petitioner's counsel consists of "activity necessary to be performed for the employer's benefit".

This element fails under the facts in the instant case. The men were carrying lamps and batteries for the employer's benefit, they were carrying drinking water for his benefit. On many occasions they carried tools, detonators and explosives. The travel from the portal to the face was an activity necessary to be performed for the employer's benefit. The coal couldn't be mined unless the men travelled from the portal to the face.

The fourth element is based upon conditions peculiar to the occupation of mining. Under this three sub-heads are

used: First, conditions replete with hazards. The man-trips in the coal mines were dangerous (R. 384, 334, 335, 420, 461, 463). Second, conditions required physical exertion and mental alertness, which we have already discussed. Third, conditions unpleasant and burdensome to those encountering them.

## X. Conclusion

The petitioner seems to think that the equities of the case are in its favor. We cannot believe, for our own part, that the fact that men have labored for many years without full pay creates any equity which would require them to labor for the rest of their lives without getting full pay.

Counsel also make a point that no work was required of the employees between the portal and the face. The language of the statute is an answer to this. The statute covers a situation where the employee is "suffered or permitted" to work more than the prescribed period.

Counsel for petitioner valorously assumed to argue the case of the entire coal industry of America. The only questions before this Court are the questions affecting the operation of the Jewell Ridge mines.

If the overwhelming majority of the coal operators of America have settled their problems with the United Mine Workers of America, that settlement is not in issue in this cause. The Jewell Ridge Corporation did not settle. It preferred to go to court. If the petitioner-corporation feels that employees should be paid for all the years despite their disclaimer, we do not presume that they would find very many employees who would refuse the payment when it was offered them.

The suggestion that there was a contract for the period from April 1 to June 20 is hardly borne out by the facts. The entire coal problem arose because the United Mine Workers of America did not have a contract. The Presi-

dent of the Jewell Ridge Coal Corporation testified that the last contract he signed (supplemental agreement) was to the basic contract from April 1, 1941 to April 1, 1943 (R. 71). The contract argument, therefore, seems to us to be entirely beside the point.

Respectfully submitted,

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I hereby certify that I have mailed a copy of the foregoing brief and argument to Mr. William A. Stuart, Abingdon, Virginia; and Mr. George Richardson, Jr., 506 Commercial Bank Building, Bluefield, West Virginia.

This — day of February, 1945.

CRAMPTON HARRIS,
*Counsel for Respondent.*

## APPENDIX 1

### Statute Involved

The pertinent provisions of the Fair Labor Standards Act (Act of June 25, 1938, c. 676, 52 Stat. 1060 (29 U. S. C., sec. 201)) are as follows:

Sec. 3(g) "Employ" includes to suffer or permit to work.

Sec. 3(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

Sec. 7(a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

# APPENDIX 2

Table 68—p. 100—Bulletin 462 Bureau of Mines U. S. Dept. of Interior. Coal Mine Accidents in the United States: 1942. For the years 1938-42.

TABLE 68.—*Number of fatalities and nonfatal injuries at coal mines in the United States for the years 1938–42*

| Cause of accident | Bituminous | | | | |
|---|---|---|---|---|---|
| | 1938 | 1939 | 1940 | 1941 | 1942 |
| Underground | | | | | |
| Falls of roof or face | 10,548 | 10,604 | 11,853 | 12,452 | 13,224 |
| Mine cars and locomotives | 7,836 | 8,082 | 9,368 | 9,833 | 11,581 |
| Explosions of gas or coal dust | 143 | 95 | 206 | 150 | 114 |
| Explosive | 253 | 216 | 292 | 245 | 318 |
| Electricity | 540 | 574 | 755 | 737 | 931 |
| Machinery (cutters, loaders, etc.) | 2,738 | 3,081 | 3,722 | 4,457 | 4,911 |
| Mine fires | 9 | 8 | 7 | 18 | 14 |
| Miscellaneous | 11,561 | 12,098 | 13,402 | 14,256 | 17,105 |
| Total underground | 33,628 | 34,758 | 39,605 | 42,148 | 48,198 |
| Shaft | 64 | 64 | 91 | 70 | 69 |
| Stripping or open-cut mining[1] | 1,036 | 1,133 | 1,339 | 1,450 | 1,460 |
| Surface:[2] | | | | | |
| Haulage | 556 | 651 | 701 | 753 | 893 |
| Machinery | 210 | 251 | 363 | 320 | 345 |
| Miscellaneous | 1,300 | 1,687 | 1,895 | 1,896 | 2,228 |
| Total surface | 2,066 | 2,589 | 2,959 | 2,969 | 3,466 |
| Grand total | 36,794 | 38,544 | 43,994 | 46,637 | 53,193 |

# APPENDIX 3

Table 3—page 6. Mineral Industry Surveys—U. S. Dept. of Interior Bureau of Mines. Coal Mine Fatalities CMF No. 150

TABLE 3.—*Deaths and fatality rates at coal mines in the United States 1942 and 1943, by causes of accidents*[1]

January–December 1942

| Cause | Bituminous | |
|---|---|---|
| | Number killed | Killed per million short tons |
| Underground: | | |
| Falls of roof and coal | 622 | 1.073 |
| Haulage | 254 | .438 |
| Gas or dust explosions: | | |
| Local | 20 | .034 |
| Major | 127 | .219 |
| Explosives | 20 | .034 |
| Electricity | 50 | .087 |
| Machinery | 41 | .071 |
| Shaft | 8 | .014 |
| Miscellaneous | 33 | .057 |
| Total underground | 1,175 | 2.027 |
| Stripping or opencut | 20 | .034 |
| Surface | 59 | .102 |
| Grand total | 1,254 | 2.163 |

[1] All figures are subject to revision.

# APPENDIX 4

Table 3—page 6—Mineral Industry Surveys—U. S. Dept. of Interior Bureau of Mines—Coal Mine Fatalities CMF No. 162

TABLE 3.—*Deaths and fatality rates at coal mines in the United States 1943 and 1944, by causes of accidents*[1]

| Cause | Bituminous | |
|---|---|---|
| | Number killed | Killed per million short tons |
| **January–December 1943** | | |
| Underground: | | |
| Falls of roof and coal | 623 | 1.056 |
| Haulage | 235 | .398 |
| Gas or dust explosions: | | |
| Local | 22 | .037 |
| Major | 148 | .251 |
| Explosives | 28 | .047 |
| Electricity | 31 | .053 |
| Machinery | 27 | .046 |
| Shaft | 8 | .014 |
| Miscellaneous | 38 | .064 |
| Total underground | 1,160 | 1.966 |
| Stripping or opencut | 24 | .041 |
| Surface | 60 | .101 |
| Grand total | 1,244 | 2.108 |
| **January–December 1944** | | |
| Underground: | | |
| Falls of roof and coal | 546 | 0.881 |
| Haulage | 227 | .366 |
| Gas or dust explosions: | | |
| Local | 11 | .018 |
| Major | 22 | .036 |
| Explosives | 17 | .027 |
| Electricity | 33 | .053 |
| Machinery | 40 | .065 |
| Shaft | 4 | .006 |
| Miscellaneous | 93 | .150 |
| Total underground | 993 | 1.602 |
| Stripping or opencut | 30 | .048 |
| Surface | 48 | .077 |
| Grand total | 1,071 | 1.727 |

[1] All figures are subject to revision.